No. 9544

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. W. BROOKS, CARL M. DONALDSON, BYRON ECHOLS, B. J. GALE, G. LYNN HATCH, RACHEL JENSEN, MILTON N. JENSEN, R. T. JOHNS, WILLARD E. JONES, JOHN B. JONES, PARLEY P. JONES, T. V. JONES, P. L. LUNT, FENLEY F. MERRILL, ORSON A. MERRILL, HANS MORTENSEN, LESLIE B. PAYNE, ORSON J. RICHENS, HENRY L. SMITH, FLORENCE R. SWOFFORD, MARY JANE JONES, ANNA H. LUNT, NANCY O. PACE, JUNIUS E. PAYNE, J. E. PAYNE, Trustee of the Church of Jesus Christ of Latter Day Saints, E. C. PAYNE, RALPH RICHARDSON, R. RICHENS, NANCY A. SMITH, E. THYGERSON, and B. Y. WHIPPLE,

Appellants,

vs.

UNITED STATES OF AMERICA and C. A. FIRTH,

Appellees.

Upon Appeal from the District Court of the United States for the District of Arizona.

REPLY BRIEF FOR APPELLANTS.

M. C. MECHEM,
A. T. HANNETT,
First National Bank Building, Albuquerque, New Mexico,
Attorneys for Appellants.

H. VEARLE PAYNE,
L. P. McHALFFEY,
Lordsburg, New Mexico,
Of Counsel.

Subject Index

Page

Argument 2

I. This was a suit to quiet title and as far as it affects water rights in New Mexico the decree is void.... 2

II. The District Court had no power to enforce its decree through its water commissioner: it could only do so through coercion of the defendants.... 7

III. New Mexico is an indispensable party to this proceeding 9

IV. The decree and orders in this suit are not binding on the defendants' "assigns and successors in interest" in the water rights in New Mexico for the reason that it is a decree in rem and has no force or effect 12

V. The Sunset Canal Company had been dissolved when its appearance was entered as a defendant in this suit and the decree against it was a nullity..... 13

VI. The District Court cannot enforce its decree and orders in New Mexico under present conditions.... 18

VII. The court erred in overruling the motion of Parley P. Jones, R. W. Brooks and Rachel Jensen to quash process and service upon them in New Mexico as officers of Sunset Canal Company..... 21

VIII. The fine of $100 imposed on each respondent was improper 21

Conclusion 24

Table of Authorities Cited

Cases

	Pages
Bean v. Morris, 221 U. S. 485	20
Christensen Engineering Co. v. Westinghouse Air Br. Co. (2 Cir.), 135 Fed. 774	23
Coiron v. Millandon, 60 U. S. (19 How.) 113	11
Dexter-Greenfield Drainage Ditch, In re, 21 N. M. 286, 154 P. 382	17
Fall v. Eastin, 215 U. S. 1	12
La Luz Community Ditch v. Town of Alamogordo, 34 N. M. 134, 279 Pac. 72	16
Miller & Lux v. Rickey, et al., 152 Fed. 11	3, 4
Minnesota v. Hitchcock, 185 U. S. 376, 382	11
Montezuma Co. v. Smithville Co., 218 U. S. 371	12
New Mexico Products Co. v. New Mexico Power Co., 42 N. M. 311-321, 77 Pac. (2d) 634	20
Norstrom v. Wahl, 41 Fed. (2d) 910 (6 Cir.)	23
Salton Sea Cases, 172 F. 792	3, 4
Snow v. Abalos, 18 N. M. 681, 140 Pac. 1044	15
Standifer Construction Corp. v. Commissioner, Internal Revenue, 78 Fed. (2d) 285 (9 Cir.)	18
Vineyard L. & S. Co. v. Twin Falls, S. R. L. & W. Co., 245 Fed. 9	7
Vineyard L. & S. Co. v. Twin Falls, Oakley, L. & W. Co., 245 Fed. 30	9

Statutes and Codes

New Mexico Session Laws of 1921, Chapter 185	13
New Mexico Statutes Annotated, 1929 Compilation:	
Section 151-414	14
Section 151-426	15
New Mexico Session Laws 1912, Chapter 84, Sec. 1	Appendix

Text Books

American Jurisprudence: Page
Vol. 12, p. 438 19
Vol. 13, p. 173 13
Vol. 13, pp. 195-196 14

1 Beale on Conflict of Laws, pp. 425, 426 20

No. 9544

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. W. Brooks, Carl M. Donaldson, Byron Echols, B. J. Gale, G. Lynn Hatch, Rachel Jensen, Milton N. Jensen, R. T. Johns, Willard E. Jones, John B. Jones, Parley P. Jones, T. V. Jones, P. L. Lunt, Fenley F. Merrill, Orson A. Merrill, Hans Mortensen, Leslie B. Payne, Orson J. Richens, Henry L. Smith, Florence R. Swofford, Mary Jane Jones, Anna H. Lunt, Nancy O. Pace, Junius E. Payne, J. E. Payne, Trustee of the Church of Jesus Christ of Latter Day Saints, E. C. Payne, Ralph Richardson, R. Richens, Nancy A. Smith, E. Thygerson, and B. Y. Whipple,

Appellants,

vs.

United States of America and C. A. Firth,

Appellees.

Upon Appeal from the District Court of the United States for the District of Arizona.

REPLY BRIEF FOR APPELLANTS.

The appellants contend that this was an action to quiet title to real estate and in so far as they and their lands and water rights situated in New Mexico are concerned the decree is wholly null and void.

If this court so determines, all the other questions presented and argued will not be considered by this court.

If, however, this court should rule that this was a suit in tort to obtain an injunction to restrain appellants from diverting the waters of the Gila River in New Mexico to the prejudice of the United States, then whether New Mexico is an indispensable party and the validity of the orders of the court become pertinent.

I.

THIS WAS A SUIT TO QUIET TITLE AND AS FAR AS IT AFFECTS WATER RIGHTS IN NEW MEXICO THE DECREE IS VOID.

Replying to appellees' arguments under paragraph A, page 19 of their brief, we submit the following observations:

At pages 36 and 37 of their brief, appellees state:

> "Largely because of this Court's trail-blazing decisions in the *Miller & Lux* and the *Salton Sea Cases,* Professor Beale in 1913 observed that 'the federal courts show a tendency to transcend state lines in the exercise of equity jurisdiction'."
>
> * * * * * * *
>
> "Since no single court has physical jurisdiction of the entire Gila River, justice can be done by

> having all rights determined and enforced by one court. If, in order to accomplish that end, affirmative but lawful acts must be done abroad, there is no reason why their performance should not be ordered."

The Supreme Court of the United States is the only court which has physical jurisdiction of the entire Gila River.

The *Miller & Lux* and *Salton Sea Cases* did not "blaze a new trail" extending territorial jurisdiction of federal courts of equity beyond state lines. In each of these cases the federal district court obtained personal jurisdiction over the defendants.

In the *Salton Sea Cases* the suit was originally filed in the State Court of California and removed to the federal court. If the case had remained in the state court the state court's territorial jurisdiction would have been identical with the district federal court's jurisdiction, and its jurisdiction *in personam* over the parties would have been identical.

Federal district courts have no more power to decide water rights on interstate streams than have state courts. The United States by its complaint in the case at bar sought to quiet title to water rights in New Mexico as to the first ten miles of the Gila River east of the New Mexico-Arizona line. (R. 23.) The Gila River runs many miles above the Virden Valley and runs through the Counties of Catron, Hidalgo and Grant, a fact which the maps disclose and of which fact this court will take judicial notice.

If suit were brought now by the United States in behalf of its Indian wards, or if suit were brought by any person or corporation in the United States District Court for the District of Arizona against an up-stream water user in New Mexico beyond the ten-mile limit covered by the decree in this case to restrain such up-stream user from tortious use of the water belonging to the United States or an Arizona user, or to quiet title or affect the title of the up-stream users in New Mexico, the United States District Court would be without jurisdiction to hear or determine the case; nor could the defendants by process be brought before the court *in personam* unless the New Mexico up-stream defendant came in and voluntarily submitted himself to the jurisdiction of the court or was served with process in Arizona. Such submission on the part of the up-stream user would submit himself to a judgment *in personam*. He could not confer jurisdiction of the *res* on the court beyond its territorial limits.

Instead of blazing a new trail, this court in the *Miller and Lux* and *Salton Sea Cases* followed a well traveled road. The decision of this court in the *Salton Sea Cases,* 172 Fed. 792-816, gives an authoritative interpretation of the effect of the *Miller and Lux* decree. This court said:

> "In Miller & Lux v. Rickey (C. C.) 127 Fed. 573, the action was brought in the Circuit Court for the District of Nevada to restrain the defendants from the wrongful diversion of the waters naturally flowing down the stream of both forks of the Walker river having their source in Cali-

fornia, and flowing down into and through the state of Nevada, where the lands of the complainant were situated. The alleged diversion was in the state of California, and the injury caused by such diversion was in the state of Nevada. It was contended on behalf of the defendant that the Circuit Court in Nevada was without jurisdiction, first, because the suit was of a local nature, and could not be brought outside of the state of California; second, because the water right in controversy was in California; third, because the wrongs and injury alleged to have been committed by the defendant were committed wholly in the state of California; fourth, that complete relief could not be decreed by the Nevada court in favor of the complainant and without reaching the property rights of the defendant which were situated wholly in California. Judge Hawley in an elaborate opinion considered the question of jurisdiction as presented by these objections, and reviewed the authorities upon the subject, meeting and answering the objection raised and urged by the defendants in this case that the court could not send its process to execute its decree into foreign territory. The court says on page 580:

" 'That this court has jurisdiction over the person of the defendant is unquestioned. It can reach him by injunction, and punish him for contempt if he violates it. This doctrine had its foundation in the equity courts of England at an early day'—citing the case of Penn v. Lord Baltimore, 1 Ves. Sr. 443, 454; 27 Eng. Rep. 1132, 1139, decided in 1750, where Lord Chancellor Hardwicke said:

" 'As to the court's not enforcing the execution of their judgment, if they could not at all, I agree

it would be in vain to make a decree, and that the court cannot enforce their own decree in rem in the present case. But that is not an objection against making a decree in the cause, for the strict primary decree in this court as a court of equity is in personam. * * * In the case of Lord Anglesey of land lying in Ireland I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree in rem; but, the party being in England, I could enforce it by process of contempt in personam and sequestration, which is the proper jurisdiction of this court.'

"The court accordingly maintained its jurisdiction of the action, and on appeal to this court the question was fully considered and the jurisdiction of the Circuit Court sustained. Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11, 81 C. C. A. 207. It may be further stated that in Massie v. Watts, 6 Cranch, 148, 157, 3 L. ed. 181, Chief Justice Marshall cited the case of Penn v. Lord Baltimore, and made the same application of the doctrine of jurisdiction of courts of equity as was made by Judge Hawley in Miller & Lux v. Rickey. We are of the opinion, therefore, that the court had jurisdiction in the present case to protect property within its jurisdiction, and to restrain the defendant from diverting the waters of the Colorado river to the damage of such property, notwithstanding the defendant may find it necessary in complying with the decree of the court to perform acts beyond the jurisdiction of the court."

This was a suit to quiet title to water rights in New Mexico and not a "suit in tort to obtain an injunction

restraining" defendants from diverting the waters of the Gila River in New Mexico to plaintiff's prejudice.

II.

THE DISTRICT COURT HAD NO POWER TO ENFORCE ITS DECREE THROUGH ITS WATER COMMISSIONER; IT COULD ONLY DO SO THROUGH COERCION OF THE DEFENDANTS.

At page 35 of their brief, paragraph B, appellees say:

> "B. The federal district court had jurisdiction * * * to appoint a commissioner to see that the provisions of the decree were respected by the water users in New Mexico."

But the court went much further. It appointed a commissioner to enforce a decree in New Mexico, and the Commissioner took over the control of the ditches in New Mexico, took over the possession of the keys to the measuring devices, turned the water on or off according to his interpretation of the decree, and retained possession and control of the ditches and measuring devices in New Mexico until he was relieved of the responsibilities by the New Mexico authorities.

But these directions in the court's decree and order were not "directions of the court operating *in personam*", but operated directly upon the *res*. *Vineyard Land and Stock Co. v. Twin Falls S. R. L. & W. Co.*, 245 Fed. 9-25 (9th Cir.).

The decree provides "that a water commissioner shall be appointed by the court to carry out and en-

force the provisions of this decree, and the instructions and orders of the court, * * * that the term of employment, expenses and compensation of said water commissioner and his assistants, the payment thereof and the means and methods for securing funds with which to pay the same shall be fixed by orders which the court may hereafter from time to time make; * * *." (Decree, paragraph XII, page iv Appendix, Appellants' original brief.)

The decree makes no distinction between the ditches and waters in Arizona and in New Mexico. While the *res* in Arizona was within the territorial jurisdiction of the court, the *res* in New Mexico was not. All of the acts of the water commissioner performed by him in New Mexico were duties personal to the defendants, except that for the protection of the plaintiff the measuring devices were subject to the inspection of the plaintiffs or a water commissioner.

These appellants are charged with the offense of failing to pay their share of the 13¢ per acre levied upon all the lands covered by the decree for the payment of the salary and expenses of the water commissioner in enforcing and carrying out the court's decree. As the court did not have jurisdiction to enforce and carry out the decree and orders of the court pursuant thereto, except through its coercion of the defendants, it did not have jurisdiction to make the defendants pay for the services of the water commissioner in doing something the court had no jurisdiction to authorize him to do.

III.

NEW MEXICO IS AN INDISPENSABLE PARTY TO THIS PROCEEDING.

Replying to appellees' argument, paragraph C, page 38 et seq. of their brief, appellants contend that although New Mexico may not have been an indispensable party to the decree at the time it was entered, it is an indispensable party to the enforcement of the court's order of December 9, 1935 (R. 57), for the reason that New Mexico has taken over the distribution of the waters of the Gila River in the Virden District so that it is impossible for the appellants to obey the order of the court.

This court, in *Vineyard Land and Stock Co. v. Twin Falls Oakley L. & W. Co.,* 245 Fed. 30-35, said:

> "The question pertaining to interstate waters is also disposed of in case No. 2885. This has direct bearing on the controversy presented by the amendment to the answer, that there is a defect of parties. The purpose of the suit is to quiet title to plaintiff's water rights in Idaho. The court is without jurisdiction to settle water rights in Nevada. No complaint is made that parties other than the defendants are attempting to interfere with plaintiffs' acquired water rights in Idaho, and there can be no cause for injunction against others than the defendants until attempted interference is shown. If there are any others who have rights superior to plaintiffs' not parties to the suit, of course their rights cannot be precluded by the decree herein. They may yet assert such rights, but they are not necessary parties to this suit, not having attempted to assert them to the impairment of plaintiffs' contention."

If New Mexico's acts are illegal their illegality cannot be determined in this proceeding, nor can those acts be nullified or prohibited by any order of the Arizona court.

It is said that the appellants have brought this condition about. The record shows that only one of the whole number of appellants complained to the New Mexico authorities, and as to those who did not complain no act on their part is shown except that they used the water when and as the same was distributed to them by the New Mexico water master. Whether they knew that the water so distributed to them was in excess of that decreed to them is not shown and cannot be presumed.

Until New Mexico's interference with the court's commissioner ceases, how can appellants obey the latter's orders, or the court's orders?

This fact was before the court and it is appellants' position that the court then was apprised of the fact that its commissioner could no longer control the waters of the Gila River in New Mexico.

In the cases cited by appellees where the interest of the upper state was suggested, in none of them had the upper state refused permission to the court's commissioner to enforce the court's decree or orders, or ousted the water users from control of their diverting structures.

In this case the commissioner had taken over the administration of the Sunset Ditch from the water users and thereafter the New Mexico authorities re-

lieved the court's commissioner from further control of the ditch.

So far as appellants are concerned, they did not control or operate the Sunset Ditch after the commissioner assumed control. All they did was to pay their acreage assessment to the Sunset Canal Company who, in turn, paid Firth, the Commissioner. This they failed to do after New Mexico ousted Firth.

If it had appeared to the court when the final decree was entered that New Mexico was in possession of and administering the Sunset Ditch, it is not conceivable that the court would have directed its commissioner to take charge of the ditch. It is the established practice of federal courts of equity to dismiss the plaintiff's bill either at the trial or in the appellate court whenever it appears that an indispensable party is not before the court. The rule will be enforced even though the question is not raised by the pleadings or suggested by counsel, and the parties cannot waive the question nor by consent confer any right on the court to proceed to a decree or order.

Minnesota v. Hitchcock (1902), 185 U. S. 376, 382;

Coiron v. Millandon, 60 U. S. (19 How.) 113.

IV.

THE DECREE AND ORDERS IN THIS SUIT ARE NOT BINDING ON THE DEFENDANTS' "ASSIGNS AND SUCCESSORS IN INTEREST" IN THE WATER RIGHTS IN NEW MEXICO FOR THE REASON THAT IT IS A DECREE IN REM AND HAS NO FORCE OR EFFECT.

Appellees argue that as the Sunset Canal Company was a party to this suit it stood in judgment for the water users under the Sunset Ditch in New Mexico. Passing the fact that the Canal Company had been dissolved prior to the entry of the decree and could not sue or be sued, this statement might be true if the United States District Court in Arizona had jurisdiction of the *res* in New Mexico.

If this is a suit *in rem* the decree has no efficacy in New Mexico for any purpose. *Fall v. Eastin,* 215 U. S. 1, 54 L. Ed. 65.

If the decree is *in personam,* it does not affect title to water rights in New Mexico and is not binding upon defendants' assigns or successors in interest to water rights in the latter state.

In *Montezuma Co. v. Smithville Co.,* 218 U. S. 371, 54 L. Ed. 1074, the court had jurisdiction of the *res* affected. The water rights adjudicated were all in Arizona.

V.

THE SUNSET CANAL COMPANY HAD BEEN DISSOLVED WHEN ITS APPEARANCE WAS ENTERED AS A DEFENDANT IN THIS SUIT AND THE DECREE AGAINST IT WAS A NULLITY.

At pages 47-53 inclusive, the appellees argue that because the Sunset Canal Company was a party defendant to the consent decree that the successors in title to the original defendants are bound by the decree because the Canal Company represented and stood in judgment for the water users under the canal.

Reversing the order in which they argue this point, we will call the court's attention to the fact that

A. The Sunset Canal Company was dissolved in 1921 prior to the filing of this cause.

As we pointed out in our previous brief, the Sunset Ditch Company was dissolved under the Act of June 14, 1921, New Mexico Session Laws, Chapter 185, to which the appellees reply that the act applies to private corporations only and that as the Canal Company was organized under an act of the territory of New Mexico which, by decision of the Supreme Court of the United States, was held to be a quasi public corporation, it does not come within the act. It seems, however, that quasi public corporations are private corporations. 13 *Am. Juris.,* Sec. 18, p. 173.

B. That the Sunset Ditch Company was not and never has been a *de facto* corporation.

The Sunset Ditch Company could not in any event be a *de facto* corporation. The Sunset Ditch

Company, having attained full status as a corporation, could not thereafter become a *de facto* corporation.

> "It is essential to the existence of a de facto corporation that there be (1) a valid law under which the corporation with the power assumed might be incorporated; (2) a bona fide attempt to organize a corporation under the law; and (3) an actual exercise of corporate powers." 13 *Am. Juris.* p. 195.

The Sunset Ditch Company was a *de jure* corporation from the date of receiving its charter up until the date it was dissolved. Whereupon it became *civiliter mortuus.*

> "Nor can a *de jure* corporation, the charter of which has been forfeited and the powers and functions of which have been suspended continue to function as a *de facto* corporation so as to give validity to its acts and contracts entered into during the period of its forfeited charter and suspended powers." 13 *Am. Juris.,* Sec. 51, p. 196.

C. That the Sunset Ditch Company was not and could never have been a community ditch.

Appellees at page 52 of their brief assert that even if the Sunset Ditch Company lost its franchise in 1921 yet it has been operating since that time as a community ditch and is therefore suable under Section 151-414, New Mexico Statutes Annotated, Compilation of 1929.

Community ditches in New Mexico are defined by Section 151-426 of the 1929 Compilation as follows:

> "The provisions of these sections shall apply only to such ditches as have been heretofore and are now known and regarded as community ditches, under the laws of this state; and under the provisions of said sections, shall be construed to mean such ditches as are not private, and such as are not incorporated under the laws of this state or of some other state or territory, and are held and owned by more than two owners as tenants in common, or joint tenants." (Sec. 8, Chap. 1, Session Laws 1895.)

The Articles of Incorporation of the Sunset Ditch Company (R. 241) show that the Sunset Ditch Company was not in existence in 1895, was not a public ditch, and was incorporated under the laws of the Territory of New Mexico, so that it appears conclusively that it was not a community ditch.

Even if the Sunset Canal or Ditch Company is a community ditch, such corporation could not represent water users or members of the community under the ditch in a suit to quiet title, as claimed by appellees in their brief at pages 48 et seq.

In the case of *Snow v. Abalos,* 18 N. M. 681, 695, 140 Pac. 1044, 1049, 1050, the Supreme Court of the State of New Mexico held that the landowner served by a community ditch is a "necessary party in an action for an adjudication of a water right

where such water rights are exercised through a community ditch".

> "Such being the case, we are of opinion, that prior to the enactment of the statute of 1895, supra, making such community acequias corporations, for certain purposes, each individual water user under a community acequia was the owner of a right to take water from the public stream or source from which it was drawn, which right was divorced from and *independent of the right enjoyed by his co-consumer;* that the fact that such water was diverted into a ditch, owned in common with other water users, did not give such other users any interest in, or control over, the right to take water, or water right, which each individual consumer possessed; that the right to divert water, or the water right, is appurtenant to specified lands, and inheres in the owner of the land; that the right is a several right, owned and exercised by the individual, and, the officers of the community acequia, in diverting the water act only as the agents of the appropriator.
>
> * * * * * * *
>
> "The ditch is simply the carrier or agency employed by the parties, to conduct the water, the right to which is appurtenant to the land, to be irrigated."

This ruling was upheld and recognized in *La Luz Community Ditch v. Town of Alamogordo,* 34 N. M. 134, 135, 279 Pac. 72, 76. The latter case was not an action to quiet title but was brought by the parties to secure construction of a decree

rendered in a suit to quiet title in which all of the individual appropriators were parties.

Appellees at page 63 of their brief refer to the case of *In re: Dexter-Greenfield Drainage District,* 21 N. M. 286, 304, 154 Pac. 382. The corporation therein referred to was a quasi-municipal corporation, the proceedings for the organization of which are initiated by the filing of a petition in the district court for the creation of the district and the assessment of the costs of construction upon the various owners of property in proportion to the benefits to their properties from the proposed improvements. It has no bearing upon any issue raised here.

Reference is made to page 1 of the Appendix of this brief in which we set forth the title of Chapter 84 of the Laws of 1912 and Section 11 thereof, which clearly show that such a drainage district as that referred to *In re: Dexter Greenfield Drainage District, supra,* is not an irrigation district nor an irrigation company.

D. The Sunset Canal Company is not a corporation by estoppel.

The Sunset Ditch Company is not a *de facto* corporation, a *de jure* corporation, nor does the doctrine of estoppel apply because it is a dissolved corporation, dissolved before the complaint was filed in the original suit, and dissolved before the entry of appearance in the original suit. Neither it, nor any person or attorney in its behalf, had

the power to appear for it. *Standifer Construction Corporation v. Commissioners of Internal Revenue,* 78 Fed. (2d) 285 (9th Cir.).

VI.

THE DISTRICT COURT CANNOT ENFORCE ITS DECREE AND ORDERS IN NEW MEXICO UNDER PRESENT CONDITIONS.

Since the entry of the decree half of the lands and water rights in New Mexico described in the decree have passed into the hands of parties who are not parties to the decree or to this proceeding.

Also since the entry of the decree the State of New Mexico has assumed control of the Sunset Canal preventing the water commissioner from enforcing, or the appellants from operating, the ditch in obedience to the court's decree.

The appellants offered to prove that as fifty per cent of the landowners under the ditch were free to take water as and when they wished it, that it was impracticable to administer the waters of the Gila River in the Virden District in obedience to the decree. This offer on the part of the appellants was denied and exception taken. (R. 175-176.)

In the five years that have elapsed since the entry of the decree fifty per cent of the then defendants have died or sold out. At the same rate in five years more none of the parties to the original suit will be amenable to the orders of the District Court of Arizona.

If appellants can show that it is impracticable to operate the ditch in obedience to the court's decree under these changed conditions, the court will not punish the appellants for contempt or continue its order in effect. 12 *Am. Juris.* p. 438.

It is certain that the decree against the New Mexico water users in the Virden District would never have been entered if it had appeared to the court that in that district half of the water users had not been made parties to the suit, and it is certain that appellants are not responsible for the change in conditions.

Appellees say in their reply that these successors in title are bound by the decree, but they do not point out how the decree can be enforced as to them or how the water commissioner can compel the enforcement of the decree as to them unless, of course, they will voluntarily submit themselves to the jurisdiction of the court.

No presumption can be indulged in, as asserted at page 39 of appellees' brief, as to the future course of any governor of any state, except that he will be jealous of the protection of the state's sovereignty and its waters.

Nor do appellees point out how the court can take away the administration of the river from the state authorities in New Mexico. The Governor of New Mexico (R. 225) found from the evidence before him that the Water Commissioner, C. A. Firth, "was invading the sovereign proprietary interests of the waters of said stream in the State of New Mexico".

In *Bean v. Morris,* 221 U. S. 485-488, the Supreme Court of the United States said:

> "It follows from what we have said that it is unnecessary to consider what limits there may be to the powers of an upper state if it should seek to do all that it could. The grounds upon which such limitations should stand are referred to in Rickey Land and Cattle Company v. Miller & Lux."

In the instant case the upper state, New Mexico, has resorted to its police power to protect what it conceives to be an invasion of its sovereign interests in the waters of the Gila River in New Mexico. It obviously seeks to exercise whatever powers it has as referred to by Mr. Justice Holmes in *Bean v. Morris, supra.*

> "The jurisdiction over the land in rem is in the sovereign of the situs, and cannot be asserted by any other sovereign." *Beale on Conflict of Laws,* Vol. 1, p. 426, citing *Hart v. Sansom,* 110 U. S. 151.

> "A water right is 'real property'." *New Mexico Products Co. v. New Mexico Power Co.,* 42 N. M. 311-321, 77 Pac. (2d) 634.

> "In order to make a partition the court must invade by its officers the soil of another state and divide up and allot its lands to suit the views of a foreign jurisdiction. This cannot be done." *Beale on Conflict of Laws,* Vol. 1, p. 425, quoting *Wimer v. Wimer,* 82 Va. 890.

That is Firth's function under the decree in the instant case, to take physical possession of, and partition, the water among the Virden users.

VII.

THE COURT ERRED IN OVERRULING THE MOTION OF PARLEY P. JONES, R. W. BROOKS AND RACHEL JENSEN TO QUASH PROCESS AND SERVICE UPON THEM IN NEW MEXICO AS OFFICERS OF SUNSET CANAL COMPANY.

At page 54 of their brief, appellees raise the question that as Jones, Brooks and Jensen were already before the court, having entered their appearance in the original suit, that it was not necessary to summon them in this proceeding as officers of the Sunset Canal Company.

However, we insist that the court erred in overruling their motion to quash process and service upon them.

Process was served outside of Arizona and the corporation had been dissolved.

VIII.

THE FINE OF $100 IMPOSED ON EACH RESPONDENT WAS IMPROPER.

At page 63 et seq. of the appellees' brief, the statement is made that the court authorized the Commissioner to employ an attorney in the present matter, and that his fees and expenses and the expenses of the water commissioner were fixed in this matter at a total of $1596.55. There was no competent evidence supporting this statement before this court. The Water Commissioner's report was admitted in evidence over the objection of the appellant. (R. 202-

203.) The appellants had no opportunity to cross-examine Mr. Firth on the contents of such report.

The order relied on to establish this sum as attorneys' fees and commissioner's expense is found at pages 74-75 appellees' brief (part of Firth three volume report), and reads, in part:

> "* * * to employ an attorney to advise him as to his rights as such commissioner under said decree relative to New Mexico State Officials taking possession of the distribution of the waters of the Gila River in New Mexico, *and such other advice as he may require from time to time in relation to the interpretation of said decree relative to his duties as such water commissioner* * * *"

Appellants were denied the opportunity to cross-examine.

The court's judgment reads, so far as material:

> "It is Further Ordered and Adjudged that the aforesaid sum of $100.00 be paid by each of said respondents forthwith to the Clerk of this Court, for the use of said Water Commissioner, C. A. Firth, to be used by him to pay the extraordinary expenses incurred by him in the preparation for and prosecution of respondents in these proceedings; *and for such other expenses as the Water Commissioner now has, or may, incur in the administration of said decree.*"

Appellees contend that all of this sum was for attorneys' fees and expenses in prosecuting this proceeding in contempt. How much of it was for "such other advice as he may require from time to time in relation

to the interpretation of said decree relative to his duties as such water commissioner", and how much of it was for "such other expense as the water commissioner now has, or may, incur in the administration of the said decree" does not appear, nor did appellants have opportunity to cross-examine on the subject.

It is also contended by appellees that it is obvious that each of the respondents separately caused over $100.00 of these expenses. It is not apparent from the record, with the exception of Parley P. Jones (assuming he inspired, directed and controlled the Governor of the State of New Mexico), that any appellant caused the expenditures of any money.

The total expense as shown by the evidence was $1596.55, part of which was for items of expense not involved in this prosecution. Instead of fining each appellant his proportionate share of $1596.55, which would have been $51.50 each, the thirty-three persons who were respondents in this proceeding were fined $100.00 each, or a total of $3300.00. These fines exceeding as they do any indemnity to which appellees were entitled, as shown by the evidence, were purely punitive.

The judgment was arrived at by conjecture as to future expenses to be incurred, and not based on evidence as to actual loss as a result of the violation of any order of the court in this proceeding. *Christensen Engineering Co. v. Westinghouse Air Brake Co.* (2 Cir.), 135 Fed. 774-782; *Norstrom v. Wahl,* 41 Fed. (2d) 910, 913 (6 Cir.).

The court fined all the respondents the same sum. The appellant Nancy O. Pace is an invalid, eighty years of age, the owner of land and water rights under the Sunset Ditch, but did not use water. She had leased her land to H. M. Pace who did use water. Mary Jane Jones did not use water, but lived with her children. She owned only a town lot in the municipality of Virden comprising 1.1 acre in area, the water being delivered to her lot by the ditch rider of the Town of Virden. (R. 183.) The Town of Virden was not a party to these proceedings.

Can it be said that Nancy O. Pace and Mary Jane Jones who did not use water should pay the same amount as one of the large landowners who did apply water to his lands?

Had the appellants not used the water that they did during the year 1939, they would have lost their annual crops, as well as their alfalfa and their trees.

CONCLUSION.

If the decree is a decree *in rem* in an action to quiet title it is void on its face.

If the decree is a judgment *in personam* the court had no power to appoint an officer, to-wit, Commissioner Firth, to invade the sovereignty of New Mexico, take physical possession of real property in that state and proceed to partition it. A judgment *in personam* could only operate to constrain the appellants to yield to the court's orders, and it is not binding on the

heirs or purchasers who are not parties to the original suit. The Sunset Ditch or Canal Company was at the time suit was filed, and is now, dissolved, and it is clearly shown by the evidence that the court cannot enforce its decree because the State of New Mexico is in possession of the Sunset Ditch.

It is not shown that the appellants violated any express order of the court, and it appears from the record that the fine imposed was punitive, not compensatory; not supported by evidence of actual damage or loss to appellees occasioned by the acts of the appellants complained of, or necessitated by the presentation of this matter to the court.

It is respectfully submitted that the judgment should be reversed with instructions to the lower court to set its judgment aside and either vacate the consent decree as to these appellants or dismiss the petition in the contempt proceeding.

Dated, Albuquerque, New Mexico,
October 16, 1940.

Respectfully submitted,
M. C. MECHEM,
A. T. HANNETT,
Attorneys for Appellants.

H. VEARLE PAYNE,
L. P. MCHALFFEY,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

Laws of New Mexico—1912

Chapter 84

An Act to Provide For the Organization and Operation of Drainage Districts, Conferring Additional Powers on Certain Officers, and For the Issuing of Bonds, Levying Assessments on Lands Benefited, Extending the Right of Eminent Domain, and For the Construction and Maintenance of Ditches and Other Works.

Section 1. Whenever a majority of the adult owners of lands within any district of land, who shall represent one-third in area of the lands within said district to be reclaimed, or benefited, desire to construct one or more drains or ditches, or to acquire by purchase or otherwise, drains theretofore constructed, or outlets for drains, for the promotion of agricultural interests and the drainage of said lands, or desire to maintain and keep in repair any such drain or ditch theretofore constructed, such owners may file in the district court of any county in which the lands, or any part of them shall lie, a petition setting forth:

1. The proposed name of said drainage district.

2. The necessity of the proposed drainage work, describing the necessity.

3. A general description of the proposed starting points, routes, and termini of the proposed drains or ditches.

4. A general description of the lands proposed to be included in said district.

5. The names of the owners of all lands in said district when known.

6. If the purpose of said petitioners is the enlargement, repair and maintenance of a ditch or drain or other work theretofore constructed, said petition shall give a general description of the same, with such particulars as may be deemed important.

7. Said petition shall pray for the organization of a drainage district by the name and with the boundaries proposed, and for the appointment of commissioners for the execution of such proposed work, according to the provisions of this and the following sections.